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VIA ELECTRONIC FILING

Jocelyn G. Boyd, Esquire
Chief Clerk & Administrator
Public Service Commission of South Carolina
101 Executive Center Drive, Suite 100
Columbia, South Carolina 29210

RE: Application of Duke Energy Progress, LLC for Approval of Rider DSM/EE-11,
Decreasing Residential Rates and Increasing Non-Residential Rates - **Docket No. 2019-262-E**

Dear Ms. Boyd:

The South Carolina Office of Regulatory Staff (“ORS”) submits this letter in reply to Duke Energy Progress, LLC’s (“DEP” or “Company”) Response to ORS’s Report filed November 15, 2019. The arguments presented by the Company should be rejected. ORS asserts that the issue of the treatment of DEP’s recovery of employee incentive compensation based on the Company’s ability to meet certain earnings per share (“EPS”) and total shareholder return (“TSR”) goals is an important piece of cost-recovery policy that the Commission should continue to review on an ongoing basis.

It would be inappropriate to accord Commission Order No. 2019-341 issue preclusive effect in the manner asserted by DEP because the Commission was acting in a legislative rather than judicial capacity. As DEP notes, “[w]hen an administrative agency is acting in a judicial capacity” and the requirements of collateral estoppel are otherwise met “courts have not hesitated to apply collateral estoppel to enforce repose.” (DEP Response 6 (quoting *Carman v. SC ABC Comm’n*, 317 S.C. 1, 6 (1994))). But “[a]ctions of an administrative agency which involve the exercise of a legislative rather than a judicial function are not res judicata.” *State ex rel. Utilities Comm’n v. Edmisten*, 294 N.C. 598, 603, 242 S.E.2d 862, 866 (1978) (citing 73 C.J.S. Public Utilities § 59, pp. 1138-1139). “The rate making activities of the Commission are a legislative function.” *Edmisten*, 294 N.C. at 603, 242 S.E.2d at 866 (citing *Utilities Commission v. General Telephone Company*, 281 N.C. 318, 189 S.E.2d 705 (1972)).¹

¹ While there does not appear to be binding South Carolina authority directly on point, courts across the country have grappled with this issue and come to a similar conclusion. See *Columbia Gas Transmission Corp. v. Interden Indus.*,

Order No. 2019-341 specifically adopted the Company's proposed incentive compensation adjustment in the Commission's "sound regulatory discretion", Order No. 2019-341 at 86, rather than pursuant to a mandatory legal compulsion required by application of law to facts. The Commission's holding in the rate case constituted an exercise of legislative rather than judicial authority, and collateral estoppel should not apply in this case in the manner suggested by the Company.

Further, ORS does not believe that each required element of collateral estoppel has been established. The incentive compensation issues litigated and determined in the recent DEP rate case were strictly limited to a specific Test Year for the determination of base rates to be applied on a going forward basis. However, the incentive compensation issue in this Demand-Side Management and Energy Efficiency ("DSM/EE") proceeding involves a true-up mechanism where actual expenses are compared to the previously determined revenue requirement, and the resulting over or under recovery of revenues is included in the revenue requirement forecasted for the next rate period. The difference reflects the distinct purposes of the annual DSM/EE docket—which focuses on evaluation and cost recovery of DSM/EE programs implemented to advance overarching energy efficiency and conservation policy as reflected in Order Nos. 2009-373 and 2015-596—and a rate case proceeding—which does not.² The Commission's policy treatment of the ORS adjustment in this proceeding is directly applicable to future DSM/EE proceedings, and the Commission has the authority to consider the issue in this proceeding.

Inc., No. 1:08 CV 1493, 2010 WL 11664965, at *8 (N.D. Ohio Apr. 30, 2010) ("the FERC [CPCN] Order was quasi-legislative, and as a result, does not have preclusive effect"); *Panhandle E. Pipe Line Co. v. Fed. Power Comm'n*, 236 F.2d 289, 292 (3d Cir.1956) (holding, in the context of res judicata, that proceedings of FERC's predecessor agency culminating in issuance of CPCN were quasi-legislative and thus could not carry preclusive effect); *Second Taxing Dist. of City of Norwalk v. F.E.R.C.*, 683 F.2d 477, 484 (D.C.Cir.1982) (rate-making proceedings are quasi-legislative and thus have no issue preclusive effect); *Columbia Gas Transmission LLC v. Crawford*, 2010 WL 1628056, at *2 (N.D. Ohio Apr. 22, 2010) (holding that FERC CPCN Order could not have preclusive effect because it was a quasi-legislative administrative decision)); *Consumers Energy Co. v. Michigan Public Service Comm'n*, 268 Mich. App. 171, 707 N.W.2d 633 (2005) (res judicata and collateral estoppel inapplicable in the fixing and regulating of rates by the public service commission as such is a legislative rather than judicial function); *Commonwealth Edison Co. v. Illinois Commerce Comm'n*, 2010 WL 3909376 (Ill. App. Ct. 2d Dist. 2010) (Decisions of the state commerce commission are not res judicata because the concept of public regulation requires that commission have power to deal freely with each situation that comes before it regardless of how it may have dealt with a similar or even the same situation in a previous proceeding); *Kansas Gas & Electric Co. v. Kansas Corporation Comm'n*, 239 Kan. 483, 491, 720 P.2d 1063 (1986) (public utility rate making is a legislative function); *Unified Sch. Dist. No. 259 v. State Corp. Comm'n*, 176 P.3d 250 (Kan. Ct. App. 2008) ("[R]ate proceedings are generally considered a legislative, rather than quasi-judicial, function. Thus, the doctrines of res judicata and collateral estoppel are not mandatory"); see also 73B C.J.S. Public Utilities § 239 ("A [public utility] commission is a legislative and not a judicial body, and generally its decisions are not res judicata in later proceedings before it.").

² See generally *Second Taxing Dist. of City of Norwalk v. F.E.R.C.*, 683 F.2d 477, 484 (D.C. Cir. 1982) ("Ratemaking proceedings are especially unlikely to present the proper occasion for invocation of the doctrine [of collateral estoppel], because the appropriateness of a given rate involves policy considerations such as the encouragement of conservation that may be weighed differently over time.") (citing *Borough of Lansdale, Pa. v. FPC*, 494 F.2d 1104, 1115 n.45 (D.C.Cir.1974); *Florida Power & Light Co. v. FERC*, 617 F.2d 809, 816 (D.C.Cir.1980) (agency may adopt new policy in adjudicative proceeding "so long as it proceeds on a reasoned basis that is not clearly outside the statutory framework.")).

Finally, compelling countervailing policy considerations counsel against the application of collateral estoppel. The policy considerations that support the application of collateral estoppel in the judicial context and in the agency-as-adjudicator context, such as promoting the finality of decisions and decreasing the chances of inconsistent adjudication, should not be applied in a manner that conflicts with the Commission's mandate to construct a workable regulatory scheme in accordance with legislative intent.³ In many cases, this end is best served by allowing the ongoing reexamination of policy issues. Notably, none of the preclusion case law cited in DEP's Response dealt with decisions by utility commissions.⁴ Most of it dealt with disputes related to termination of employment, where the classic considerations supporting application of collateral estoppel are more relevant and the countervailing—and very complex—considerations faced by this Commission are absent. Public utility regulation requires ongoing policymaking; it is not mere dispute resolution.⁵

For similar reasons, the Commission remains free to continue to examine the reasoning behind the incentive compensation disallowance in the DESC RSA. That reasoning has clear and obvious application to the instant proceeding from a policy perspective, and ORS believes that the reasoning is relevant generally to any proceeding where the allowance or disallowance of recovery of incentive compensation from customers is at issue. DEP's mechanical conclusion that the RSA adjustment has no application to this proceeding ignores the ongoing policy questions. Notably, in the DESC RSA, DESC promoted the incentive compensation adjustment from the Commission's recent Duke rate case orders, but the Commission adopted the ORS position that ORS presently asserts. Even in the DSM/EE policy context that currently exists under Order No. 2015-596, however, the Company has previously made substantial adjustments to remove some portion of incentives in prior annual DSM/EE proceedings. This is strong evidence of the appropriateness of the adjustments here proposed—because of the continuity of the conservation and efficiency policy under which these adjustments were proposed—and better evidence than the Commission's rate case decision in Order No. 2019-349.⁶

ORS does not believe that the arguments asserted by DEP in its Response meaningfully bear on the issues now before the Commission as it considers cost recovery of annual DSM/EE expenses. As stated in its Report, ORS recommends a reduction of \$20,688.56 to remove the

³See *Porter & Dietsch, Inc. v. FTC*, 605 F.2d 294, 300 (7th Cir. 1979) (holding that public policy concerns override the usual collateral estoppel considerations); see also RESTATEMENT (SECOND) OF JUDGMENTS § 83(4) (1982); S.C. Const. Art. XI § 1 ("The General Assembly shall provide for appropriate regulation of common carriers, publicly owned utilities, and privately owned utilities serving the public as and to the extent required by the public interest.").

⁴See DEP Response 5-6 (citing *Crosby; Bennett; Earle; Shelton* (holding collateral estoppel did not apply because it would conflict with "the purposes of the ESC [Employment Security Commission]"); see also *Carman* (agency's conclusions as to an applicant's moral character binding in subsequent proceeding)).

⁵See generally Scott Hempling, *Commissions Are Not Courts; Regulators Are Not Judges* (March 2019, available at <https://www.scotthemplinglaw.com/monthly-essays>).

⁶But even looking to Order No. 2019-349, it is clear that the incentive adjustment proposed in this proceeding by ORS is sound policy because the Company "offered as an alternative position" to accept the position here advanced by ORS "to remove the actual portions of total LTI and STI compensation that are related to EPS and TSR[.]" (Order No. 2019-349 at 85 (internal punctuation and citations omitted)).

portion of Long-Term Incentives and Short-Term Incentives for all employees allocated to South Carolina program costs for the Company's EPS and TSR goals. ORS continues to reserve its right to assert positions which it believes to be true, accurate, and in the public interest, to develop those positions in light of changing circumstances, and respects the Commission's prerogative to develop and refine its regulatory policies to best serve the public of South Carolina. As the Supreme Court of Utah has stated, "an administrative agency which has a duty to protect the public interest ought not be precluded from" refining policy decisions "should it find that a prior decision is not now in accordance with its present idea of what the public interest requires."⁷

If the Commission would like additional information, ORS remains prepared to submit further comments or to appear at oral argument.

Sincerely,



Alexander W. Knowles

cc: All Parties of Record (via e-mail)
Joseph Melchers, Esquire (via e-mail)

⁷ *Salt Lake Citizens Cong. v. Mountain States Tel. & Tel. Co.*, 846 P.2d 1245, 1253 (Utah 1992) (internal quotation and citation omitted).